# Danieli & C Officine Mecchaniche SPA v Southern HRC Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA 24NCC-471–10 OF 2020
ANAND PONNUDURAI JC
22 FEBRUARY 2021

*Arbitration — Award — Final award — Extent of court's intervention — Whether Arbitration Tribunal was the appropriate forum with powers to grant relief sought — Whether rights of parties could only be determined from that final award — Whether plaintiff could have applied during arbitration proceedings to inspect plant — Whether court had no jurisdiction to determine and grant relief sough — Arbitration Act 2005 s 38*

The defendant was incorporated in Malaysia and had its business address in Prai, Penang where their plant was situated. The contract was entered in 2011 for the plaintiff to erect a plant in Prai for the defendant to produce hot rolled coils. The parties had also entered into a service agreement in 2014. The parties had agreed to arbitration under the contract and the service agreement and the arbitration clause provided that the venue of such arbitration be in Singapore consisting of three arbitrators. It was also expressly provided that the contract be governed and interpreted in accordance with the laws of Singapore. Disputes then arose and the plaintiff issued a request for arbitration claiming sums owed by the defendant on the basis of an unlawful termination by the defendant. The defendant issued a separate request claiming, amongst others, for rescission of the contract and service agreement as well as damages for misrepresentation under the Singapore Misrepresentation Act. Then, the defendant was seeking payment of the award sum from Singapore Arbitration from the plaintiff. Both cases were consolidated and heard together by a panel of three arbitrators and lasted more than three years. Based on the relevant part of the award from the arbitration tribunal ('AT'), the AT had taken into account the sums paid by the plaintiff to the defendant, the defendant's use of the plant and the diminution in value of the plant which was the basis for deducting the amounts of EUR15m as well as the RM270m from the payable sum of EUR92.7m. The plaintiff then applied to the Singapore High Court to set aside the said final award, however the application was dismissed. The defendant sought payment of the award sum through correspondence. In response, the plaintiff requested access to the site to inspect the plant to determine its status as well as integrity and ability to operate. In response, the defendant took the position that they would only give the plaintiff access to the plant subject to them paying the award sum. The plaintiff on the contrary took the position that their access to the site could not be conditional on the

payment of the award sum. This impasse had led to the current proceedings. The basis for the plaintiff's application in encl 1 was that they have a genuine interest to have their rights declared and that it was essential for them to inspect the plant so as to verify the condition before making any payment of the award sum. The plaintiff also averred and contended that the outcome of the inspection could have a material impact on the registration of the award proceedings in Italy. The defendant then filed an application ('encl 8') for a declaration that the court had no jurisdiction over the defendant in respect of the remedy sought by the plaintiff and for an order that the plaintiff's encl 1 to be struck off. The issues brought by the defendant in encl 8 were as follows: (a) whether the arbitration tribunal ('AT') was the appropriate forum with the powers to grant the relief it now sought in encl 1; (b) whether the rights of parties can only be determined from that final award; (c) whether plaintiff could have applied during the arbitration proceedings to inspect the plant but did not do so; (d) whether the court's sole power was in respect of such award was to enforce the same in accordance with the Arbitration Act 2005 ('the AA 2005'); (e) whether the award itself does not give rise to a cause of action and the plaintiff's cause of action was the right to enforce the award; and (f) whether the court has no jurisdiction to determine and grant the relief sought in encl 1 pursuant to AA 2005.

**Held**, allowing order in encl 8 vacanting encl 1 with costs of RM20,000, subject to 4% allocator fees:

(1) The Model Law 1985 envisages court's involvement only in the circumstances provided such as in issues of appointment of arbitrator, setting aside, taking evidence, recognition and enforcement of interim measures and awards. Article 5 guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it. Further, the explanatory notes to the Bill that passed the 2011 amendments to the Act stated that the purpose to the amendment to s 8 was to limit the court's intervention to situations specifically covered by the principal Act and to discourage the use of inherent powers (see paras 32–33).

(2) With the 2011 amendments, the Act has application and makes provisions for assistance, supervision or enforcement of an international arbitration where the seat was outside Malaysia such as in ss 10(4) and 11(3). Section 11(3) expressly provides that a party may, before or during arbitral proceedings, apply to a High Court for any interim measure in respect of an international arbitration where the seat is not Malaysia. The court found merit in the defendants contention that it was clearly open to the plaintiff to have made an application for an interim measure or for inspection of the plant before or during the arbitral proceedings. The plaintiff clearly did not do so and contended that they could not do so as the transfer of the plant was not a relief sought. Based on the arbitral

award, it was quite clear that the plaintiff had made submissions on the issue of the return of the plant which they contended before the AT was most likely to be in a state of utter disrepair and that the contract price must be adjusted to take into account the diminution in value of the plant by reason of the same lying idle for three years after the termination (see paras 36 & 37–38).

(3) The plaintiff had not undertaken any proceedings in Malaysia under s 38 of the AA 2005 and utilizing procedure under O 69 of the Rules of Court 2012 to enforce the award and the court was of the view that its application for inspection through encl 1 could not by any stretch of imagination be considered as an application to enforce the award. The plaintiff's application in encl 1 was premised on the final award. Reading ss 51(4) and 8, the court held that that encl 1 was indeed a court proceeding relating to arbitration and as such s 8 is applicable so as to prohibit intervention of the court (see paras 42 & 46–47).

(4) The court viewed the real intent of encl 1 was to try and procure evidence to be utilised in the Italian proceedings. The courts were vigilant to avoid and prevent its process from being abused more so when the court was not seized with the jurisdiction to make the orders a party seeks. The court did not have jurisdiction to entertain the plaintiff's application which seeks to reopen matters already decided in arbitration or attempts to attack the award. The court concluded that the plaintiff's application in encl 1 was a court proceeding in relation to an arbitration and governed by the AA 2005. As such, by virtue of s 8, the court had to decline jurisdiction. There was merit in encl 8 (see paras 54–55 & 56).

**[Bahasa Malaysia summary**

Defendan telah diperbadankan di Malaysia dan mempunyai alamat perniagaan di Prai, Pulau Pinang di mana kilangnya terletak. Kontrak telah dimasuki pada 2011 untuk plaintif mendirikan kilang untuk defendan untuk menghasilkan gegelung panas. Pihak-pihak juga telah memasuki kontrak perkhidmatan pada tahun 2014. Pihak-pihak telah bersetuju untuk menyelesaikan pertikaian melalui penimbangtaraan melalui klausa penimbangtaraan yang mana tempatnya adalah di Singapura dengan tiga orang penimbangtara. Kontrak itu juga jelas memperuntukkan bahawa kontrak itu ditafsirkan mengikut undang-undang Singapura. Pertikaian kemudian timbul dan plaintif menuntut melalui timbang tara menuntut jumlah wang yang terhutang oleh defendan berdasarkan penamatan kontrak yang menyalahi undang-undang oleh defendan. Defendan membuat tuntutan balas yang menuntut, antara lain, untuk pembatalan perjanjian kontrak dan perkhidmatan serta ganti rugi atas salah urus di bawah Misrepresentation Act di Singapura. Kemudian, defendan menuntut bayaran jumlah awad yang diberikan oleh timbang tara Singapura daripada plaintif. Kedua-dua kes ini telah didengar bersama oleh panel tiga penimbang tara dan berlangsung lebih daripada tiga tahun.

A Berdasarkan bahagian anugerah yang relevan daripada Tribunal Timbang Tara ('TT'), TT telah mengambil kira jumlah wang yang dibayar oleh plaintif kepada defendan, penggunaan loji oleh defendan dan pengurangan nilai loji yang menjadi asas untuk memotong jumlah EUR15 juta serta RM270 juta daripada jumlah yang perlu dibayar sebanyak EUR92.7 juta. Plaintif B kemudian memohon kepada Mahkamah Tinggi Singapura untuk mengetepikan awad muktamad tersebut, yang mana permohonan tersebut ditolak. Defendan meminta bayaran awad itu melalui surat menyurat. Sebagai tindak balas, plaintif meminta akses ke lapangan untuk memeriksa kilang untuk menentukan statusnya dan keupayaan untuk beroperasi. Sebagai tindak C balas, defendan mengambil kedudukan bahawa mereka hanya akan memberikan akses plaintif kepada kilang tertakluk kepada mereka membayar jumlah awad. Plaintif sebaliknya menegaskan bahawa akses mereka ke lapangan ini tidak boleh bersyarat kepada pembayaran jumlah awad. Pertikaian ini telah membawa kepada prosiding ini. Asas bagi permohonan D plaintif dalam lampiran 1 adalah bahawa mereka mempunyai kepentingan untuk mempunyai hak mereka diisytiharkan dan bahawa adalah penting bagi mereka untuk memeriksa kilang untuk mengesahkan keadaan sebelum membuat pembayaran jumlah awad. Plaintif juga menegaskan bahawa hasil E pemeriksaan boleh memberi kesan material kepada pendaftaran prosiding awad timbang tara Singapura di Itali. Defendan kemudian memfailkan permohonan ('lampiran 8') untuk pengisytiharan bahawa mahkamah tidak mempunyai bidang kuasa ke atas defendan berkenaan dengan remedi yang dituntut oleh plaintif dan untuk perintah bahawa lampiran 1 plaintif ditolak. F Isu-isu yang dibawa oleh defendan dalam lampiran 8 ini adalah seperti berikut: (a) sama ada Tribunal Timbang Tara ('TT') adalah forum yang sesuai untuk memberikan perintah yang dipohon di dalam lampiran 1; (b) sama ada hak pihak-pihak hanya boleh ditentukan daripada awad muktamad itu; (c) sama ada plaintif boleh memohon semasa prosiding timbang tara untuk memeriksa G kilang tetapi tidak berbuat demikian; (d) sama ada kuasa tunggal mahkamah adalah berhubung dengan anugerah tersebut dan boleh dikuat kuasa menurut Akta Timbang Tara 2005 ('ATT 2005'); (e) sama ada awad tersebut tidak menimbulkan kausa tindakan dan kausa tindakan plaintif adalah hak untuk menguatkuasakan awad tersebut; dan (f) sama ada mahkamah tidak H mempunyai bidang kuasa untuk menentukan dan memberikan perintah yang dipohon di dalam lampiran 1 menurut ATT 2005.

**Diputuskan**, membenarkan perintah yang dipohon di dalam lampiran 8 yang menolak lampiran 1 dengan kos RM20,000 tertakluk kepada fi alokatur 4%:

I (1) Model Law 1985 menyatakan bahawa kuasa mahkamah hanya dalam keadaan seperti pelantikan penimbang tara, mengenepikan, mengambil keterangan, pengiktirafan, langkah penguatkuasaan dan anugerah interim. Perkara 5 menjamin bahawa campur tangan mahkamah boleh dilakukan sekiranya terdapat undang-undang yang mengguna pakai

Model Law. Selanjutnya, nota penjelasan kepada Rang Undang-Undang yang meluluskan pindaan 2011 kepada Akta menyatakan bahawa tujuan untuk pindaan kepada s 8 adalah untuk mengehadkan campur tangan mahkamah kepada situasi yang diliputi khusus oleh Akta induk dan untuk tidak menggalakkan penggunaan kuasa mahkamah (lihat perenggan 32–33).

(2) Dengan pindaan 2011, Akta ini mempunyai permohonan dan membuat peruntukan untuk bantuan, penyeliaan atau penguatkuasaan timbang tara antarabangsa di mana bidang kuasa tersebut berada di luar Malaysia seperti tertakluk di dalam ss 10(4) dan 11(3). Seksyen 11(3) dengan jelas memperuntukkan bahawa mana-mana pihak boleh, sebelum atau semasa prosiding timbang tara, memohon kepada Mahkamah Tinggi untuk apa-apa langkah interim berkenaan dengan timbang tara antarabangsa di mana bidang kuasa tersebut bukan di Malaysia. Mahkamah mendapati merit di pihak defendan bahawa plaintif mempunyai hak untuk membuat permohonan untuk langkah interim atau untuk pemeriksaan kilang sebelum atau semasa prosiding timbang tara. Plaintif jelas tidak berbuat demikian dan berpendapat bahawa mereka tidak dapat berbuat demikian kerana pemindahan kilang itu bukan perintah yang dipohon di permohonan ini. Berdasarkan awad timbang tara, agak jelas bahawa plaintif telah menghujahkan mengenai isu pemulangan kilang yang mereka hadapi sebelum TT membuat keputusannya dan harga kontrak mesti diselaraskan untuk mengambil kira perbezaan nilai kilang itu dengan alasan yang sama selama tiga tahun selepas pelupusan kes itu di hadap TT (lihat paras 36 & 37–38).

(3) Plaintif tidak memulakan sebarang prosiding di Malaysia di bawah s 38 ATT 2005 dan mengguna pakai prosedur di bawah A 69 Kaedah-Kaedah Mahkamah 2012 untuk menguatkuasakan awad tersebut dan mahkamah berpendapat bahawa permohonannya untuk pemeriksaan melalui lampiran 1 bukanlah satu permohonan untuk menguatkuasakan awad itu. Permohonan plaintif dalam lampiran 1 adalah berdasarkan awad muktamad. Merujuk kepada ss 51(4) dan 8, mahkamah mendapati bahawa lampiran 1 merupakan satu prosiding mahkamah berkaitan timbang tara dan oleh itu s 8 adalah terpakai untuk melarang campur tangan mahkamah (lihat perenggan ss 42 & 46–47).

(4) Mahkamah melihat tujuan lampiran 1 adalah untuk percubaan mendapatkan bukti yang akan digunakan dalam prosiding Itali. Mahkamah ini berhati-hati untuk mengelakkan dan menghalang prosesnya daripada disalah gunakan lebih-lebih lagi apabila mahkamah tidak mempunyai bidang kuasa untuk membuat perintah yang dipohon. Mahkamah tidak mempunyai bidang kuasa untuk membenarkan permohonan plaintif yang berusaha membuka semula isu yang telah diputuskan oleh timbang tara atau cubaan membangkitkan perkara awad

tersebut. Mahkamah menyimpulkan bahawa permohonan plaintif dalam lampiran 1 adalah prosiding mahkamah berhubung timbang tara dan ditadbir oleh ATT 2005. Oleh itu, menurut s 8, mahkamah ini tidak mempunyai bidang kuasa. Terdapat merit di dalam lampiran 8 (lihat perenggan 54–55 & 56).]

**Cases referred to**

*AV Asia Sdn bhd v Pengarah Kuala Lumpur Regional Centre for Arbitration & Anor* [2013] 10 CLJ 115, HC (refd)

*Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors* [2008] 5 CLJ 654, HC (refd)

*Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693, FC (refd)

*Felda Investment Corporation Sdn Bhd v Synergy Promenade Sdn Bhd* [2020] MLJU 1465, HC (refd)

*Hartawan Development Sdn Bhd v Pentadbir Tanah Daerah Melaka* [2017] 6 MLJ 386; [2017] 2 CLJ 536, CA (refd)

*Hiap-Taih Welding & Construction Sdn Bhd v Boustead Pelita Tinjar Sdn Bhd(formerly known as Loagan Bunut Plantations Sdn Bhd)* [2008] 8 MLJ 471, HC (refd)

*Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1, FC (distd)

*La Kaffa International Co Ltd v Loob Holding Sdn Bhd and another appeal* [2018] MLJU 703; [2018] MLJU 1395; [2018] 9 CLJ 593, CA (refd)

*Malayan Flour Mill Bhd v Raja Lope & Tan Co* [2000] 6 MLJ 591, HC (refd)

*Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, CA (refd)

*Protasco Bhd v Tey Por Yee and another appeal* [2018] MLJU 993; [2018] 5 CLJ 299, CA (distd)

*Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd* [2020] 3 MLJ 342; [2020] 2 CLJ 833, CA (refd)

*Sintrans Asia Services Pte Ltd v Inai Kiara Sdn Bhd* [2016] 2 MLJ 660, CA (refd)

**Legislation referred to**

Arbitration Act 1952 (repealed by the Arbitration Act 2005)
Arbitration Act 2005 ss 1, 8, 10, 10(4), 11, 11(3), 38, 42, 51, 51(4)
Misrepresentation Act [SG]
Rules of Court 2012 O 15 r 16, O 28 r 3B(1), O 69, O 92 r 4
Specific Relief Act 1950 s 41

*Shanti Mogan (Lilien Wong with her) (Shearn Delamore & Co) for the applicant.*
*Nithin Nadkani (Andrew Chew and Zahidah Zulkifli with him) (Lee Hishammuddin Allen & Gledhill) for the respondent.*

**Anand Ponnudurai JC:**

**[1]** The facts of this case are not complicated. The legal issues involved are however a bit more complex and relate to the jurisdiction of the court to intervene in matters relating to arbitration and/or governed by the Arbitration Act 2005.

BACKGROUND FACTS

**[2]** Although a detailed examination of the merits of the dispute between the parties is not required, it is nonetheless important to set out some of the background which has led to the filing of this OS by the plaintiff. The salient facts can be summarised as follows.

**[3]** The plaintiff is a company incorporated in Italy and, inter alia, manufactures steelmaking plants.

**[4]** The defendant is incorporated in Malaysia and has its business address in Prai, Penang where their plant is situated.

**[5]** Parties had entered into a contract in 2011 whereby the plaintiff would erect a plant in Prai for the defendant to produce hot rolled coils. Parties had also entered into a service agreement in 2014. The parties had agreed to arbitration under the contract and the service agreement and the arbitration clause provided that the venue of such arbitration be in Singapore consisting of three arbitrators. It was also expressly provided that the contract be governed and interpreted in accordance with the laws of Singapore.

**[6]** Disputes then arose and the plaintiff issued a request for arbitration claiming sums owed by the defendant on the basis of an unlawful termination by the defendant. The defendant issued a separate request claiming, amongst others, for rescission of the contract and service agreement as well as damages for misrepresentation under the Singapore Misrepresentation Act.

**[7]** Both cases were consolidated and heard together by a panel of three arbitrators and lasted more than three years. After considering all the evidence, the arbitration tribunal ('AT') made the following orders vide a final award dated 28 November 2019 ('the said final award') with the following as the dispositive part:

> 664. Having considered all of the evidence and submissions placed before it, and for the reasons set out above, the majority of the Tribunal hereby FINALLY DECIDES and DETERMINES as follows:
>
> 1. The Contract and the Service Agreement are rescinded;

2. The Claimants shall repay the Respondent the Contract Price in the amount of EUR92,700,000.00 minus EUR 15 million and RM270 million (converted to euro at the highest interbank exchange rate for buying euro with MYR prevailing in Kuala Lumpur at the date of the Award);

3. In return, the Respondent shall transfer the title to the Plant, including the additional equipment installed, to Danieli;

4. The Claimants shall pay the Respondent RM176,245,250 as damages for misrepresentation under section 2(1) of the Misrepresentation Act (cap 390);

5. The Respondent is entitled to pre-award interest from 16 June 2011 at the rate of 2% simple interest per annum on the sum stated above in paragraph 664.2 until the date of this Final Award;

6. If within 90 days of the date of this Final Award, the Claimants fail to pay in full the amounts set out in paragraph 664.2 (including pre-award interest in accordance with paragraph 664.5) and paragraph 664.4 the Claimants shall pay post-award interest on any outstanding amount at the rate of 5.33% simple interest per annum until payment;

7. The Claimants shall pay the Respondent EUR4,416,302,84 for the legal and other costs of this arbitration and USD667,500 for the costs of the arbitration as fixed by the ICC Court at USD1,335,000; and

8. All of the Parties' other claims and requests for relief are rejected.

**[8]** The award is a lengthy one consisting of 664 paras. However, for the purposes of this judgment, it is only necessary in my view to state that in the award, as evident from para 403 as well as para 662(d) therein, the AT had taken into account the sums paid by the plaintiff to the defendant, the defendant's use of the plant and the diminution in value of the plant which was the basis for deducting the amounts of EUR15m as well as the RM270m from the payable sum of EUR92.7m.

**[9]** Thereafter, the plaintiff applied to the Singapore High Court to set aside the said final award. Such an application was dismissed on 12 August 2020 and is now pending further appeal to the Singapore Court of Appeal. The defendant has also applied to the courts in Italy for recognition of the said final award in Italy and those proceedings are still pending.

**[10]** In the meantime, from correspondence between the parties exhibited to the plaintiff's application herein, the defendant was seeking payment of the award sum from the plaintiff. In response, the plaintiff requested access to the site to inspect the plant to determine its status as well as integrity and ability to operate. In response, the defendant took the position that they would only give the plaintiff access to the plant subject to them paying the award sum. The

plaintiff on the contrary took the position that their access to the site could not be conditional on the payment of the award sum. This impasse has led to the current proceedings.

THE PLAINTIFF'S CLAIM HEREIN

**[11]** Through this originating summons, the plaintiff claims the following relief:

1. A declaration that the Plaintiff is entitled to inspect the steel plant for the production of hot rolled coils ('Plant') and additional equipment ('Additional Equipment') both referenced in the Arbitral Award dated 28.11.2019 ('Arbitral Award') and located at 2723, Lorong Perusahaan 12, Prai Industrial Estate, Prai, 13600 Pulau Pinang, Malaysia ('Site') for the purposes of inspection and ascertaining the existence, status and condition of the same ('Inspection') and to enter and access the Site for the aforesaid purpose.

2. Orders to give effect to the above declaration, including the following orders:

   (a) That the Plaintiff, through its appointed agents, representatives and/or nominees, be permitted to enter onto the Site and be granted access to the Plant and Additional Equipment on dates to be ordered by this Honourable court;

   (b) That the Plaintiff, through its appointed agents, representatives and/or nominees, be permitted to inspect the Plant and the Additional Equipment;

   (c) That the inspection shall be carried out during business days (Monday-Friday) and during business hours (from 9am-6pm) for a duration of no less than seven (7) working days with thirty (30) days' notice given to the parties in advance;

   (d) That up to a number of seven (7) of the Plaintiff's appointed agents, representatives and/or nominees may be present at the Site and conduct the Inspection;

   (e) That the Plaintiff and/or its appointed agents, representatives and/or nominees shall be entitled to make notes, take photographs and/or video or other form of recording to record and /or document the status and condition of the Site, the Plant and the Additional Equipment;

   (f) That throughout the Inspection, the defendant shall ensure that the Site is safe for the Inspection to be carried out. This includes ensuring the lightings are provided and necessary workshop tools and equipment for the Inspection are made available to the Plaintiff;

   (g) That throughout the Inspection, the defendant shall make available

to the Plaintiff at the Site an operation office with office fittings (including desks, chairs, lightings and internet) that could fit up to seven (7) people;

(h) That the Inspection may be carried out in the presence of not less than five (5) number of the defendant's appointed agents, representatives and/or nominees; and

(i) That the Plaintiff and/or its appointed agents, representatives and/or nominees be afforded full co-operation to facilitate the Inspection to enable them to

(j) conduct and complete the Inspection.

**[12]** The basis for the plaintiff's application as can be gleaned from their affidavit in support was that they have a genuine interest to have their rights declared and that it is essential for them to inspect the plant so as to verify the condition before making any payment of the award sum. The plaintiff also avers and contends that the outcome of the inspection could have a material impact on the registration of the award proceedings in Italy.

**[13]** A perusal of the intitulement of the plaintiff's OS will reveal that the court was being moved under s 41 of the Specific Relief Act 1950 ('the SRA'), O 15 r 16 of the Rules of Court 2012 ('the ROC') and O 92 r 4 of the ROC.

**[14]** However, at the first case management before me on 28 October 2020, learned counsel for the defendant informed the court that the defendant intended to file an application pursuant to O 28 r 3B(1) for a declaration that this court had no jurisdiction over the defendant in respect of the remedy sought by the plaintiff and for an order that the plaintiff's OS be struck off.

**[15]** I then directed the defendant to file such an application by 5 November 2020 and fixed the matter for a further case management ('CM') on 5 November 2020 for parties to address me on the sequence of hearing of the two applications. At such CM, having heard both learned counsel, in accordance with trite principles such as that pronounced by the Court of Appeal in the case of *Hartawan Development Sdn Bhd v Pentadbir Tanah Daerah Melaka* [2017] 6 MLJ 386; [2017] 2 CLJ 536, I had ruled that I would hear the defendants application in encl 8 and to decide first whether this court had jurisdiction over the subject matter.

**[16]** As such, I fixed the hearing of encl 8 for the 4 December 2020 and fixed encl 1 for hearing on 15 January 2021 in the event I was to rule that the court did indeed have jurisdiction. In the meantime, I allowed the defendant to defer the filing of its affidavit in reply in relation to the plaintiff's application in encl 1.

**[17]** I then heard both learned counsel on 4 December 2020 with the aid of their extensive written aubmissions and wish to thank them for the same which has greatly assisted me in arriving at this judgment.

**[18]** I now propose to set out the rival contentions of both parties and after analysing the same, give my reasons for the acceptance or rejection of the same. As this judgment deals with the defendant's application in encl 8 on jurisdiction, it is perhaps apt that I set out the defendant's contentions first.

THE DEFENDANT'S CONTENTION

**[19]** The submissions of learned counsel for the defendant in support of the application in encl 8 can be summarised as follows:

(a) as the parties having agreed that all disputes between them be resolved by arbitration, the AT was the appropriate forum with the powers to grant the relief it now sought in encl 1;

(b) bearing in mind that there has already been issued a final award dated 28 November 2019, the rights of parties have now merged into and can only be determined from that final award;

(c) that the plaintiff could have applied during the arbitration proceedings to inspect the plant but did not do so;

(d) this court's sole power is in respect of such award is to enforce the same in accordance with the Arbitration Act 2005 ('the AA 2005');

(e) the award itself does not give rise to a cause of action and the plaintiff's cause of action is the right to enforce the award; and

(f) since neither party has applied to enforce the said award pursuant to s 38 of the AA 2005, then pursuant to the provisions of the AA 2005, this court has no jurisdiction to determine and grant the relief sought in encl 1.

THE PLAINTIFFS CONTENTION

**[20]** In contrast, the contentions of learned counsel for the plaintiff were in essence as follows:

(a) this court had the jurisdiction as the defendant is incorporated in Malaysia as well as the plant is situated in Malaysia;

(b) the AA 2005 does not govern the right to inspect the plant and as such the said Act cannot oust the court's jurisdiction to grant the relief sought;

(c) they are not seeking to recognise and enforce the award but merely seeking to ascertain if the plant (being the subject matter of the award) exists and if so, the condition it is in;

(d) it is irrelevant as to whether the plaintiff could have sought for inspection during the arbitration and that in any event, it could not have done so as the transfer of the plant was not a relief sought in the arbitration; and

(e) the Malaysian court does have jurisdiction as the plaintiff has honored its obligation to arbitrate and is not seeking to arbitrate in Malaysia any dispute arising out of the agreement.

**[21]** Parties have also labored to explain the process of the registration proceedings and its timelines in the Italian court and the relevancy of the inspection etc for those proceedings. But with due respect, in my view, those are not matters that are relevant for the immediate purpose of deciding on the issue of the court's jurisdiction in the first place. They may however bear relevance in the event I decide that there is jurisdiction and when deciding the merits of the plaintiff's application in encl 1 if we get to it.

ANALYSIS/ DECISION

**[22]** Bearing in mind the respective contentions of parties as highlighted above, in my considered view, the first point of reference has to be the AA 2005 which adopted the Model Law 1985 of the United Nations Commission on International Trade Law ('UNCITRAL'). AA 2005 repealed the Arbitration Act 1952 .

**[23]** Learned counsel for the defendant contends that AA 2005 is a complete and comprehensive code which exhaustively and exclusively sets out the courts entire jurisdiction and powers when dealing with all arbitrations whether seated within or outside Malaysia. To support such contention, reliance is placed on the long title of AA 2005 which provides as follows:

> An Act to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and for related matters

**[24]** Specific reference was also made to ss 8 and 51(4) of the AA 2005 which provide as follows:

> 8 Extent of court intervention
>
> No court shall intervene in matters governed by this Act, except where so provided in this Act
>
> ...
>
> 51 Repeal and savings

...

(4) Any court proceedings relating to arbitration commenced after the commencement of this Act shall be governed by this Act notwithstanding that such proceedings arose out of arbitral proceedings commenced before the commencement of this Act.

**[25]** It is to be noted though that although s 51 is placed in the 'repeal and savings' part of AA 2005, there is no equivalent to s 51(4) in the Model Law.

**[26]** Equally to be noted is the fact that both s 8 and 51 above were amended/inserted by Act 1395 with effect from 1 July 2011 after a decision by the High Court in the case of *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors* [2008] 5 CLJ 654 ('*Aras Jalinan*') which was upheld by the Court of Appeal.

**[27]** In *Aras Jalinan*, the plaintiff there applied for an injunction pending determination of an arbitration where Singapore was the seat of arbitration. The defendant's contended that the Malaysian courts had no jurisdiction and the plaintiff would have to seek recourse from the Singapore courts. The court there thus had to decide if the courts in Malaysia had either the statutory or inherent right to grant injunctive relief in respect of matters where the seat of arbitration was outside Malaysia. Badariah Sahamid J (as Her Ladyship then was) in holding that the Malaysian courts had no such jurisdiction, had an opportunity to review the historical evolution of AA 2005 and had at para 16 of the judgment referred to the rationale for the act as follows:

[16] After deliberation and consultation with relevant parties the Attorney General's Chambers decided to enact a single Act based on Model Law. The rationale was briefly, to have a single reference point for both domestic and foreign arbitrations as well as to promote consistency between international and domestic arbitral regimes. The rationale underlying Model Law is to set the parameters within which courts have jurisdiction to assist or supervise arbitration, as well as to support party autonomy in international commercial arbitration. The move from the 'English model' to Model Law also reflects an appreciation of the need to adopt an arbitral regime that reflects worldwide consensus on principles and practices of international arbitration. It is with the above in mind, that I arrive at the following determination:

**[28]** Her Ladyship went on to refer to the preamble as well as to the application provision in s 1 and held that the AA 2005 applied to domestic and international arbitrations whereby she noted that it was silent on the third category ie international arbitrations where the seat of arbitration is outside Malaysia. Her ladyship there also found support from s 8 which then read as follows:

A Unless otherwise provided, no court shall intervene in any matters governed by this Act

**[29]** Her Ladyship then concluded that s 8 clearly meant that any assistance or supervision of the courts must be expressly provided either under the act or other statutes. It was further held that consequentially, the power of intervention by courts may not be inferred, either from the invocation of inherent or residual common law powers. It was further observed that s 8 was intended to bring certainty to arbitration proceedings by setting out the specific matters of court assistance or supervision in respect of such proceedings.

**[30]** Interestingly, the amendments to AA 2005 in 2011 recast s 8 to state 'No court shall intervene in matters governed by this Act, except where so provided in this Act'.

**[31]** Further, in respect of other amendments in 2011 to ss 10 and 11, it now related to and are applicable to international arbitrations where the seat of arbitration is not in Malaysia. Hence, the amendment to s 11(3) extended the power of the courts to make orders on interim measures in respect of international arbitrations where the seat is not in Malaysia.

**[32]** So what then is the true effect and purport of s 8 of the AA 2005? What was the purpose for the provision? In the explanatory note by the UNCITRAL secretariat on the 1985 Model Law, it is stated that the trend was in favour of limiting and clearly defining court involvement and in such spirit, the Model Law envisages court involvement only in the circumstances provided such as in issues of appointment of arbitrator, setting aside, taking evidence, recognition and enforcement of interim measures and awards. It is explained that article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model law, except for matters not regulated by it.

**[33]** Further, in the explanatory note to the bill that passed the 2011 amendments, it states that the purpose to the amendment to s 8 is to limit court intervention to situations specifically covered by the Principal Act and to discourage the use of inherent powers.

**[34]** Hence, it is the defendant's contention that in respect of matters that fall within the ambit of AA 2005, the court has no jurisdiction, whether inherent or express, other than that expressly provided for in the Act. The explanatory notes referred to above clearly fortifies the defendant's contention. In relation to the specific words 'governed by this act' in s 8, the defendant highlights that s 51(4) refers to the exact same words. It is thus submitted that upon reading

the two sections together, as encl 1 relates to an arbitration commenced after the commencement of the Act, then this court cannot intervene save where provided for in the Act.

**[35]** The defendant also refer and rely to an earlier decision of mine in *Felda Investment Corporation Sdn Bhd v Synergy Promenade Sdn Bhd* [2020] MLJU 1465 where I had agreed and adopted Mary Lim J (as Her Ladyship then was) interpretation of s 8 in the case of *AV Asia Sdn bhd v Pengarah Kuala Lumpur Regional Centre for Arbitration & Anor* [2013] 10 CLJ 115 in that s 8 was intentional and deliberate and reflected the policy of non-intervention.

**[36]** As seen earlier, with the 2011 amendments, AA 2005 clearly also has application and makes provisions for assistance, supervision or enforcement of an international arbitration where the seat is outside Malaysia such as in ss 10(4) and 11(3). In this regard, a perusal of s 11 and in particular s 11(3) expressly provides that a party may before or during arbitral proceedings apply to a High Court for any interim measure in respect of an international arbitration where the seat is not Malaysia.

**[37]** As such, I find merit in the defendant's contention that it was clearly open to the plaintiff to have made an application for an interim measure or for inspection of the plant before or during the arbitral proceedings. The plaintiff clearly did not do so and contend that they could not do so as the transfer of the plant was not a relief sought. Such a contention finds no favour with me as bearing in mind that the defendant herein was seeking rescission in the arbitration, the possibility of such being ordered was surely within the parties contemplation. Further, as highlighted by the defendant, the Singapore High Court when dismissing the plaintiff's application to set aside the final award had held that the plaintiff knew full well that rescission was in play throughout the arbitration.

**[38]** In any event and furthermore, having perused the arbitral award, it was quite clear that the plaintiff had made submissions on the issue of the return of the plant which they contended before the AT was most likely to be in a state of utter disrepair and that the contract price must be adjusted to take into account the diminution in value of the plant by reason of the same lying idle for three years after the termination.

**[39]** More importantly, it is to be noted that the provision of such interim measures may only be applied for before or during the arbitral proceedings. There is no dispute herein that the arbitral proceedings have completed and the plaintiff contends that the AT is functus officio. This then leads me to the issue as to what application does and can the AA 2005 have once a final award has been handed down. Surely if the intent is to limit intervention before or during

A arbitral proceedings, it cannot be contended that the courts have wider powers of intervention upon conclusion of such arbitral proceedings.

**[40]** The fact that the plaintiff's application is intrinsically linked to the arbitration proceedings is beyond dispute as the plaintiff themselves submit B that the declaration sought arises from the award which requires transfer of the plant.

**[41]** The question then arises, what is the plaintiffs cause of action?

C

**[42]** In this regard, the defendant submits that the cause of action created by an arbitral award is the right to recognise and enforce it by entry as a judgment of the High Court. This was clearly an option open to the plaintiff under s 38 of the AA 2005 and utilising the procedure in O 69 of the ROC. Reliance for this proposition was placed on cases such as *Malayan Flour Mill Bhd v Raja* D *Lope & Tan Co* [2000] 6 MLJ 591 as well as *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316.

**[43]** The defendant also relies on the decision in *Sintrans Asia Services Pte Ltd* E *v Inai Kiara Sdn Bhd* [2016] 2 MLJ 660 where the Court of Appeal when dealing with a Singapore arbitral award held that the court in Malaysia is purely an enforcement court and must recognise a valid arbitration award.

**[44]** Similarly, in the case of *Hiap-Taih Welding & Construction Sdn Bhd v* F *Boustead Pelita Tinjar Sdn Bhd(formerly known as Loagan Bunut Plantations Sdn Bhd)* [2008] 8 MLJ 471, David Wong J (as His Lordship then was) had occasion to examine what was a parties cause of action once an arbitration award has been handed down wherein His Lordship concluded that the award itself does not give rise to a cause of action but that the cause of action is to G enforce the award.

**[45]** The above was adopted by a recent Court of Appeal decision in the case of *Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd* [2020] 3 MLJ 342; [2020] 2 CLJ 833. Although this matter related to the issue of whether H the High Court in Kuala Lumpur or Kota Kinabalu had jurisdiction to hear an application to set aside an award under a domestic arbitration heard in Kuala Lumpur, it nonetheless reiterated the position that the award itself does not give rise to a cause of action but that the cause of action is the right to enforce the award.

I

**[46]** The plaintiff has certainly not undertaken any proceedings in Malaysia under s 38 of the AA 2005 to enforce the award and in my view, its application for inspection through encl 1 cannot by any stretch of imagination be considered as an application to enforce the award.

**[47]** In my considered view, there is no doubt that the plaintiff's application is premised on such final award. Reading s 51(4) and s 8, I am persuaded by the defendant that encl 1 is indeed a court proceeding relating to arbitration and as such s 8 is applicable so as to prohibit intervention.

**[48]** On the part of the plaintiff, learned counsel Ms Shanti Mogan concedes that s 8 provides that for matters that are governed by the AA 2005, where the court can intervene and if it does so, it must intervene in the manner prescribed under the Act. However, she contends that s 8 does not oust the court's jurisdiction to hear matters which fall outside the scope of the AA 2005. In this regard, she submits that the plaintiff's application seeking inspection of the plant post the award is not a matter governed by the Act and as such, this court does have jurisdiction to hear encl 1.

**[49]** In support, the plaintiff relies on the decision of the Federal Court in the case of *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1; [2018] 1 CLJ 693 and submits that s 8 is confined to a non-interventionist approach only in matters governed by the AA 2005, not on matters not specified in the AA 2005. *Far East* dealt with s 42 of the now repealed Arbitration Act 1952 and did not consider s 51(4). The Federal Court there recognised that the AA 2005 which was based on the Model Law reformed the law relating to arbitration and with regards to s 8 of the AA 2005 made the following observations and held as follows:

> (3) Section 8 of the AA 2005 provides that 'no court shall intervene in matters governed by this act, except where so provided in this act' which is read to mean 'minimal intervention consistent with the policy underlying the Uncitral Model Law. pertinent to 'where so provided in this act', AA 2005 provides for the court intervention in the matters stated in ss 10, 11, 13(7). 15(3). 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 and 46 of AA 2005. where a party seeks intervention is one of those situations, the court is permitted to intervene only in the manner prescribed by the model law, and in the absence of any express provision the court must not intervene at all (paras 111 & 114).

**[50]** The plaintiff also relies on the decision of the Court of Appeal in *La Kaffa International Co Ltd v Loob Holding Sdn Bhd and another appeal* [2018] MLJU 703; [2018] MLJU 1395; [2018] 9 CLJ 593 to support its submission that s 8 does not oust the court's jurisdiction to hear matters not expressly set out in the AA 2005. However, it is to be noted that the case dealt with an application for interim measures pursuant to s 11 which the court had jurisdiction. In any event, in the majority judgment of Hamid Sultan JCA, His Lordship at para 29 did remark that by virtue of s 8, the court will be slow to provide a relief if it is not clearly spelt out in AA 2005.

**[51]** The plaintiff also then sought to rely on recent decisions such as *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 5 MLJ 1 and *Protasco Bhd v Tey Por Yee and another appeal* [2018] MLJU 993; [2018] 5 CLJ 299 where the courts have exercised jurisdiction in matters not provided for in the AA. With respect, the facts of those cases are different in that they related to the courts exercising inherent jurisdiction to stay arbitral proceedings on an application by a non-party to the arbitration agreement. In fact, in *Jaya Sudhir*'s case, the court held that the language of ss 8 and 10 were clear and unambiguous and did not apply to third-parties and as such its policy and object to promote respect for self-autonomy and self-restraint by courts when intervening should not be extended to the non-party. In this matter at hand, it is indisputable that parties are indeed the parties to the arbitration agreement and that the arbitration has in fact concluded.

**[52]** Finally, the plaintiff also referred me to several decisions from other jurisdictions such as Hong Kong, Singapore, England and Australia where the courts there have intervened. Some of the arbitrations in those cases were not governed by the Model Law or dealt with matters/applications made during the arbitral proceedings or their facts different. As such, with respect to learned counsel for the plaintiff, I don't find those decisions to be of much assistance.

**[53]** The plaintiff has also submitted that s 8 is to facilitate arbitration proceedings, not to limit the courts jurisdiction. Whilst I would agree that it is to facilitate arbitration proceedings, in my view, it mainly is to facilitate the same before or during the arbitral proceedings. In so far as once an award is handed down, the courts facilitation is limited to recognition and enforcement. In this regard, I am in agreement with the defendant's contention that apart from s 38, the court cannot grant any other relief in respect of a foreign award.

**[54]** In my view, the real intent of encl 1 is to try and procure evidence to be utilised in the Italian proceedings. Our courts are ever vigilant to avoid and prevent its process from being abused more so when the court is not seized with the jurisdiction to make the orders a party seeks. I agree that the court does not have jurisdiction to entertain the plaintiff's application which seeks to reopen matters already decided in arbitration or attempts to attack the award.

**[55]** In the final analysis, having considered the provisions of the AA 2005 and the cases above, and having applied them to the facts in this matter, I cannot help but conclude that the plaintiff's application in encl 1 is a court proceeding in relation to an arbitration and governed by the AA 2005. As such, by virtue of s 8, the court has to decline jurisdiction.

**[56]** In the upshot, having considered all matters, I find merits in encl 8 and allow order in terms of prayers 1 and 2 with costs of RM20,000 (subject to 4% allocator). Hearing date for encl 1 on 15 January 2021 was thus vacated.

*Enclosure 8 allowed with costs of RM20,000 subject to 4% allocator fees.*

Reported by Muhamad Azham Marwan